

## FACSIMILE TRANSMISSION COVER PAGE

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JEROME COUNTY JUDICIAL ANNEX  
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DATE: 6-13-7 PAGE(S): 8  
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MESSAGE: Order

CV 2007-526

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DISTRICT COURT  
FIFTH JUDICIAL DIST  
JEROME, IDAHO

2007 JUN 12 PM 3 58

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

*Joseph Burns*  
DEPUTY CLERK

IDAHO GROUND WATER )  
APPROPRIATORS, INC. MAGIC )  
VALLEY GROUNDWATER )  
DISTRICT and NORTH SNAKE )  
GROUND WATER DISTRICT, )

Plaintiffs

vs.

IDAHO DEPARTMENT OF )  
WATER RESOURCES and DAVID )  
TUTHILL, JR., IN HIS OFFICIAL )  
CAPACITY AS DIRECTOR OF )  
THE IDAHO DEPARTMENT OF )  
WATER RESOURCES, )

Defendants,

and

BLUE LAKES TROUT FARMS, )  
INC.; CLEAR LAKES TROUT CO., )  
INC.; ANITA K. HARDY; RIM )  
VIEW TROUT COMPANY, INC.; )  
JOHN W. "BILL" JONES, JR. and )  
DELORES JONES; CLEAR )  
SPRINGS FOODS, INC.; RANGEN )  
INC.; AMERICAN FALLS )  
RESERVOIR DISTRICT NO. 2; )  
A&B IRRIGATION DISTRICT; )  
BURLEY IRRIGATION )  
DISTRICT; MILNER )  
IRRIGATION DISTRICT; NORTH )  
SIDE CANAL CO.; and TWIN )  
FALLS CANAL CO., )

Intervenors.

Case No. CV 2007-526

ORDER DISMISSING APPLICATION  
FOR TEMPORARY RESTRAINING  
ORDER, COMPLAINT FOR  
DECLARATORY RELIEF, WRIT OF  
PROHIBITION AND PRELIMINARY  
INJUNCTION

I.

PROCEDURE

1. This matter came before the Court pursuant to an *Application for Temporary Restraining Order and Order to Show Cause and Complaint for Declaratory Relief, Writ of Prohibition, Temporary Restraining Order and Preliminary Injunction* filed May 7, 2007, through counsel, by the Idaho Ground Water Appropriators, *et al.* On May 31, 2007, the case was assigned to this Court based on the disqualification of the Honorable John Butler.
2. Motions to intervene were filed by Clear Springs Foods, Inc., Blue Lakes Trout Farm, Inc., *et al.*, Rangen Inc., John W. "Bill" Jones, Jr. and Delores Jones and American Falls Reservoir District #2, *et al.* ("Surface Water Coalition"). The motions to intervene were granted via a separate order issued June 1, 2007.
3. Motions to dismiss were filed by the Idaho Department of Water Resources and the various intervenors, alleging *inter alia*: the Court's lack of jurisdiction for failure to exhaust administrative remedies.
4. A hearing was held on the matter on June 6, 2007, wherein the Court granted the motions to dismiss and dismissed the action without prejudice, and to avoid further delay, stated the basis for its decision on the record in open court.

II.

ORDER


THEREFORE, for the reasons stated on the record in open court, a copy of the transcript of the Court's oral ruling is attached hereto, the *Motion to Dismiss* is **granted** and the *Application for Temporary Restraining Order, Complaint for Declaratory Relief, Writ of Prohibition and Preliminary Injunction* is **dismissed without prejudice**.

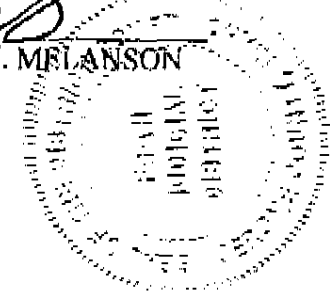
**RULE 54(b) CERTIFICATE**

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

IT IS SO ORDERED.

Dated June 12, 2007.

  
HONORABLE JOHN M. MELANSON  
District Judge



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1 THE COURT: We're on record in Case Number CV  
2 2007-526, Idaho Ground Appropriators and others, versus  
3 Idaho Department of Water Resources. The parties are  
4 present with counsel -- or I should say that counsel for  
5 the parties are present, as are counsel for the  
6 intervenors. I am prepared to rule from the bench in this  
7 matter and I will do so at this time.

8 The doctrine of prior appropriation has been the  
9 law in Idaho for over 100 years. It is set forth in our  
10 State Constitution at Article 15 and in our statutes at  
11 Idaho Code Section 42-106, which was enacted in 1899.  
12 Prior appropriation is a just, although sometimes harsh,  
13 method of administering water rights here in the desert,  
14 where the demand for water often exceeds water available  
15 for supply. The doctrine is just because it acknowledges  
16 the reality that in times of scarcity, if everyone were  
17 allowed to share in the resource, no one would have enough  
18 for their needs, and so first in time - first in right is  
19 the rule. The doctrine is harsh, because when it is  
20 applied, junior appropriators may face economic hardship or  
21 even ruin.

22 I say these things in an introductory way so the  
23 parties and other people who may be interested will know  
24 that I know the possible consequences of my ruling today,  
25 and I do not take this decision or its consequence lightly,

<p style="text-align: right;">Page 2</p> <p>1 but it is a decision that I believe to be mandated by law. 2 My decision today is based simply and solely upon the fact 3 that the plaintiffs have not exhausted their administrative 4 remedies. 5 I do agree that there may be some colorable 6 defenses, such as reasonable pumping levels, futile call 7 and reasonableness of diversion. This, however, is not the 8 proceeding in which those issues should be raised. In 9 American Falls Reservoir District Number Two versus Idaho 10 Department of Water Resources, 143 Idaho 862, in a case 11 decided in March of this year, cited by the parties, the 12 court dealt with strikingly similar circumstances: A 13 declaratory judgment action brought while an administrative 14 proceeding was pending. In American Falls No. 2 it was 15 surface water users challenging the manner and process by 16 which the Director responded to a delivery call against 17 ground water pumpers. The surface water users contended 18 that the Director's response was contrary to law and 19 ultimately unconstitutional. Although both the surface 20 water users and the ground water pumpers, including Idaho 21 Ground Water Users Association, requested a hearing before 22 the Director, prior to the hearing being conducted the 23 surface water users filed an action for declaratory relief 24 challenging, among other things, the constitutionality of 25 the rules of conjunctive management: The very same rules</p>	<p style="text-align: right;">Page 4</p> <p>1 ground water pumpers appeared in defense of the Director's 2 application of the rules, including an argument that the 3 surface water users must first exhaust their administrative 4 remedies before seeking judicial review. In its opening 5 brief on appeal IGWA argued: Moreover, the legislature 6 already has specified the process for resolving challenges 7 to such unlawful agency action. The proper procedure is 8 through judicial review, pursuant to the Administrative 9 Procedures Act, Idaho Code Section 67-5270; not a 10 collateral attack as the plaintiffs have undertaken here. 11 The APA also contains entire sections on agency 12 hearing procedures, evidence, and other related matters, 13 e.g. Idaho Code Sections 67-5242, hearing procedure; and 14 67-5271, evidence. The Department applies these as part of 15 its rules. The district court's approach tosses out 16 administrative law, end quote. 17 That's from the affidavit of Mr. Arrington, 18 Exhibit I to the IGWA opening brief, page six. 19 Apparently the Supreme Court agreed with IGWA, 20 holding that administrative remedies must be exhausted 21 before even constitutional issues can be raised before the 22 District Court, unless there is a facial challenge. The 23 Supreme Court held, quote: Important policy considerations 24 underlie the requirement for exhausting administrative 25 remedies, such as providing the opportunity for mitigating</p>
<p style="text-align: right;">Page 3</p> <p>1 which govern the Director's response to this call. 2 In American Falls No. 2 the court reaffirmed the 3 long-standing general requirement that a party not seek 4 declaratory relief until administrative remedies have been 5 exhausted unless that party is challenging the rule's 6 facial constitutionality. The court relied on Idaho Code 7 Section 67-5271 and the Regan versus Kootenai County Case, 8 140 Idaho 721, a 2004 case. 9 In the case now before this court, IGWA, I'll 10 refer to it as both parties have referred to it -- Idaho 11 Ground Water Appropriators Association by its acronym -- 12 initially requested a hearing before the director. The 13 hearing was placed on hold when the constitutional 14 challenges to the rules of conjunctive management was 15 raised in American Falls No. 2. Finally, because both 16 cases involved application of the same rules, after the 17 Supreme Court issued its ruling in American Falls No. 2, 18 the Director issued a notice of potential curtailment on 19 May 10, 2007, almost a month ago. Instead of re-noticing 20 or requesting immediate hearing before the Director and 21 arguing its claims and defenses, IGWA filed the instant 22 action. As such, the Director has not developed a 23 full-administrative record and ruling on the claims and 24 defenses raised. 25 Ironically, in American Falls No. 2, IGWA and the</p>	<p style="text-align: right;">Page 5</p> <p>1 or curing errors without judicial intervention, deferring 2 to the administrative processes established by the 3 legislature and the administrative body and the sense of 4 comity for the quasi-judicial functions of the 5 administrative body. That's from American Falls No. 2, 6 quoting White versus Bannock County Commissioners, 139 7 Idaho 396, at 401 - 402. 8 Frankly, this Court, despite the differences 9 pointed out by the plaintiffs, has difficulty in 10 meaningfully distinguishing American Falls No. 2 and the 11 instant case. Although American Falls No. 2 dealt with a 12 constitutional challenge, the underlying principles are the 13 same, and the Supreme Court defined the scope of the 14 exceptions to the exhaustion of administrative remedies 15 requirement. The essence of what was at issue in American 16 Falls No. 2 was the manner in which the Director responded 17 to the delivery call. Although the action was argued and 18 analyzed as a facial challenge, the Supreme Court held it 19 was an as-applied challenge, and it held that an as-applied 20 challenge did not provide an exception to the exhaustion of 21 the administrative remedies requirement. 22 The court reasoned, quote: To hold otherwise 23 would mean that a party whose grievance presents issues of 24 fact or misapplications of rules or policies could 25 nonetheless bypass his administrative remedies and go</p>

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1 straight to the courthouse by the simple expedient of  
2 raising a constitutional issue. Again, from American Falls  
3 No. 2, citing Foremost Insurance versus Public Service  
4 Commission 985, S.W. 2d 793.

5 Although IGWA has not framed the issues in terms  
6 of a constitutional challenge, it is nonetheless raising  
7 issues pertaining to the perceived misapplication of rules,  
8 and raising issues of fact and law, which according to the  
9 holding in American Falls No. 2, must first be ruled on by  
10 the administrative agency prior to seeking judicial review.

11 The surface water users in American Falls No. 2  
12 raised issues pertaining to the lawfulness of the  
13 Director's response to a delivery call. They simply  
14 asserted that the infirmities rose to the level of  
15 constitutional proportions because of the property rights  
16 at stake. Ultimately, the district court in that case  
17 applied a facial challenge analysis because the Director's  
18 actions, although alleged to be contrary to law, were  
19 consistent with the conjunctive management rules.

20 Nonetheless, the Supreme Court rejected the  
21 so-called hybrid approach that is as applied in the facial  
22 challenge and held that administrative remedies must first  
23 be exhausted. The result of the holding is that whether a  
24 party raises legal or factual issues, or alleges that such  
25 issues rise to the level of an as-applied constitutional

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1 not persuasive.

2 As noted at the beginning of my comments, the  
3 prior appropriation doctrine sometimes leads to a harsh  
4 result, but it is just. If the court were to block this  
5 action now, every proposal curtailment would first be  
6 decided in the courts instead of where the legislature  
7 intended: At the Idaho Department of Water Resources. We  
8 would have judicial administration of water rights.

9 Perhaps if the American Falls Case No. 2 had not  
10 taken place and there was not a five-year curtailment plan  
11 already in place, and IGWA was being notified of the  
12 curtailment for the first time after the planting season  
13 had already commenced; and if the right to a  
14 pre-curtailment hearing were plainly established; and if  
15 IGWA did not have the remedy of mandamus; or perhaps other  
16 remedies such as the judicial review mentioned, perhaps  
17 then their argument that justice requires an exception to  
18 exhaustion of administrative remedies would have more  
19 merit.

20 The plaintiff's claim that the Director has  
21 exceeded his authority is also without merit. The fact is  
22 that we do not yet know what the Director will do. The  
23 question of the Director's authority must first be raised  
24 in the administrative proceeding. Idaho Code Section  
25 42-602 vests the Director with the authority to distribute

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1 challenge, administrative remedies must first be exhausted.

2 IGWA has raised two exceptions to the exhaustion  
3 of administrative remedies doctrine that were mentioned,  
4 but not discussed by the Supreme Court in American Falls  
5 No. 2. The first being: When the interest of justice so  
6 requires; and the second being: When the agency is acting  
7 outside the scope of its authority. As I mentioned a  
8 moment ago, IGWA was a participant in the American Falls  
9 No. 2 case and even advocated dismissal of the case because  
10 surface water users had failed to exhaust administrative  
11 remedies. The Supreme Court affirmed IGWA's position.

12 The court has difficulty finding the justice  
13 required for that exception to exhaustion of administrative  
14 remedies doctrine when IGWA has taken one position in one  
15 proceeding and then adopted the exact opposite position in  
16 a similar proceeding, involving similar issues.

17 The court has considered the justice of the  
18 plaintiff's cause. The timing of the proposed curtailment  
19 should not have come as a surprise. This case has been  
20 going on since 2005, the curtailment was part of a  
21 five-year-phased-in curtailment, and it had only been put  
22 on hold as a result of the American Falls No. 2 case.  
23 Here, the plaintiff's assertion that the interests of  
24 justice require the court to exercise authority over the  
25 Department before exhaustion administrative remedies, is

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1 water from all natural sources within a water district in  
2 accordance with the prior appropriation doctrine. All the  
3 rights at issue have been reported or adjudicated and have  
4 been included within a water district.

5 As far as the operation of the ground water  
6 management act, Idaho Code Section 42-237 (a), et seq., and  
7 Idaho Code Section 42-602 and 607, the court will direct  
8 IGWA's attention to its analysis in its own appellate brief  
9 in the American Falls No. 2 case, wherein IGWA asserted  
10 that the two processes were independent of each other.  
11 Specifically, quote: The rules embody the broad concepts  
12 of the act within the context of the department's  
13 traditional contested case process; rather than the ground  
14 water board proceeding. The board process remains  
15 independently available under the act. It's in the  
16 affidavit of Mr. Arrington, Exhibit I, the IGWA opening  
17 brief, page 11.

18 If the plaintiffs desire a hearing and if the  
19 Director fails to conduct that hearing, their remedies may  
20 include mandamus, possibly judicial review. Not a request  
21 that this court decide the issues that they believe should  
22 have been decided in the administrative proceeding.

23 In summary, this action provides a text book case  
24 in support of the need for exhaustion of administrative  
25 remedies. To date the Director has not ruled on the

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1 underlying claims and defenses. But despite the fact that  
2 the same claims, issues and defenses are raised in at least  
3 three different jurisdictions, the exhaustion requirement  
4 avoids forum shopping, avoids deciding cases on a piecemeal  
5 basis, and avoids inconsistent rulings on the same issues;  
6 and, frankly, it avoids inconsistent arguments made by the  
7 same parties in different forums.

8 The court finds American Falls No. 2 to be  
9 directly on point in this matter. Accordingly, it is the  
10 decision of this court, and it is hereby ordered, that the  
11 defendant's motion to dismiss is granted without prejudice  
12 as to refiling after completion of the administrative  
13 proceedings, as required by Idaho Code Section 67-5271 in  
14 the American Falls Reservoir District case.

15 Because the underlying complaint has been  
16 dismissed, the plaintiffs cannot show that they are  
17 entitled to a temporary restraining order or a preliminary  
18 injunction in this case. The TRO is therefore dissolved  
19 and the court shall not issue a preliminary injunction in  
20 this matter.

21 That concludes the court's order in this case.

22 The court, of course, doesn't have any  
23 jurisdiction at this point to tell the Director what to do,  
24 but Mr. Rassier, I'm just going to suggest that the  
25 hearings on these matters of law should be conducted with

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1 dispatch. These folks have a right to a hearing, and  
2 unless that's done, we're just going to be back here. And  
3 if it happens that it really can't be done until later in  
4 the summer or in the fall, then certainly the Director  
5 would see to it that the matters are concluded  
6 expeditiously so we're not back here next spring, perhaps  
7 after the crops are planted again. As I said, I don't have  
8 jurisdiction to order that. I wouldn't presume to do so.  
9 I'm hoping that what I've said will be enough. The court  
10 will enter a written order in this matter and judgment will  
11 be certified as a final judgment so that appeal may  
12 proceed.

13 Is there anything further from the plaintiffs in  
14 this matter?  
15  
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25



## CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 13 day of June, 2007 a true and correct copy of the Order of Assignment was faxed and mailed, postage paid to the following persons.

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By   
Judy Owens, Deputy Clerk

CERTIFICATE OF MAILING/DELIVERY